

Strengthening Charter School Authorization Laws, in Ohio and Across the Country

COURTNEY KASUBOSKI*

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	OHIO LAW—HOW ARE CHARTERS IN THE STATE OF OHIO ORGANIZED?.....	5
	A. <i>What Is a Sponsor?</i>	6
	B. <i>The Law, Pre-House Bill 2</i>	9
	C. <i>Critiques of Ohio's System</i>	9
III.	ATTEMPTS AT REFORM IN THE STATE OF OHIO	11
	A. <i>Content of House Bill 2</i>	12
	B. <i>Analysis of House Bill 2</i>	13
IV.	TIGHTENING CONTROL ON AUTHORIZERS, AND INCREASING BOARD OF EDUCATION POWER	13
	A. <i>Toward a Stricter Authorization System</i>	14
	1. <i>Increasing State Control of Authorizers</i>	15
	B. <i>Defined Separation of Control Between Authorizer and School</i>	16
V.	CONCLUSION	18

I. INTRODUCTION

As one of the few issues that does not live neatly on partisan lines, the mention of publicly attended, yet privately run charter schools is sure to incite impassioned debate on either side of the aisle. Less often discussed is how the laws that govern these schools play into their operation, and thus the public's opinion of charters.

Charters began as a concept of the “economic free market theory,” theorizing that if parents had choice in schools, the surrounding school systems would improve.¹ Charters were thought to promote experimentation, with lax

* Managing Editor, *Ohio State Law Journal*; Juris Doctor Candidate, May 2018, The Ohio State University Moritz College of Law; Master of Science in Teaching, Fordham University, August 2015; Bachelor of Science, The Ohio State University, 2013. Special thanks to my family and friends for keeping me afloat during this entire process, my New York and Columbus education warriors for your daily efforts and sacrifices, and the wisdom of Professor Charlie Wilson, Kaela King, and HBO's John Oliver in the development of this Note.

¹ Dylan P. Grady, *Charter School Revocation: A Method for Efficiency, Accountability, and Success*, 41 J.L. & EDUC. 513, 520 (2012). Milton Friedman first

governance and less oversight, from which public schools could take best practices for their own use.² Minnesota launched the nation's first charter schools by passing legislation in 1991, and opening its first charter school in 1992.³ Charter school enrollment, nationally, has increased every year from 1999 to 2014, with charter schools educating over 2.5 million children nationwide.⁴ Race to the Top, a Department of Education funding program implemented by the Obama Administration,⁵ incentivized the creation of charter schools and the removal of caps that states have placed on the total number of charter schools permitted within that state.⁶ "[Forty-three] states and the District of Columbia" now have laws allowing charter schools.⁷ Charter schools have thus remained in the national conversation as an important, and often-discussed, component of education reform. President Donald Trump's controversial appointment of Betsy DeVos has reignited the nation's debate over school choice,⁸ and likely will move decision-making about important education issues, such as how to help struggling students previously covered under No Child Left Behind, back to the states.⁹

After teaching in a charter school in New York City for two years, I was surprised to come to Ohio and see the amount of vitriol directed toward charter schools in the state. The laws governing Ohio's charter schools provided a helpful key to understanding that sentiment further. Ohio's charter schools are

proposed a school voucher system in 1955 to allow markets to work freely, and to minimize government interference. Terry M. Moe, *Beyond the Free Market: The Structure of School Choice*, 2008 BYU L. REV. 557, 558–59 (2008).

²RICHARD D. KAHLENBERG & HALLEY POTTER, A SMARTER CHARTER: FINDING WHAT WORKS FOR CHARTER SCHOOLS AND PUBLIC EDUCATION 6–7 (2014).

³Grady, *supra* note 1, at 522.

⁴*Charter School Data Dashboard*, NAT'L ALLIANCE FOR PUB. CHARTER SCHOOLS, <http://dashboard2.publiccharters.org/National/> [<https://perma.cc/HS2S-BYF5>].

⁵*Race to the Top*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> [<https://perma.cc/BAR4-9NXV>].

⁶Press Release, John White, Press Secretary, U.S. Dep't of Educ., States Open to Charters Start Fast in 'Race to Top' (June 8, 2009), <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> [<https://perma.cc/9VAR-NEGB>].

⁷Jennifer Thomsen, *50-State Comparison: Charter School Policies*, EDUC. COMMISSION STATES (Jan. 25, 2016), <http://www.ecs.org/charter-school-policies/> [<https://perma.cc/34DP-3MU2>].

⁸See Emmarie Huetteman & Yamiche Alcindor, *Betsy DeVos Confirmed as Education Secretary; Pence Breaks Tie*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/us/politics/betsy-devos-education-secretary-confirmed.html?_r=0 (on file with *Ohio State Law Journal*). "For many educators, Ms. DeVos's support for charter schools and vouchers . . . reflected a deep disconnect from public schools. . . . Ms. DeVos's critics said they would continue to fight her as she serves." *Id.*

⁹Patrick O'Donnell, *What Would Betsy DeVos Mean for Ohio Schools?*, CLEVELAND.COM (Feb. 4, 2017), http://www.cleveland.com/metro/index.ssf/2017/02/what_would_betsy_devos_mean_fo.html [<https://perma.cc/S9XQ-GLGF>]. "Trump has proposed giving states \$20 billion to expand school choices, a fund that DeVos and the Department of Education likely would oversee." *Id.*

largely reviled because of their low rates of success,¹⁰ embroilment with scandal,¹¹ and misspent money.¹² They have even drawn media attention, such as that from John Oliver's *Last Week Tonight*.¹³

In late 2016, Ohio's charter school advocacy group, the "Ohio Alliance for Public Charter Schools [(OAPCS)] announced . . . that it [would] close at the end of the year."¹⁴ Previously, OAPCS received funding from private funders, such as the Bill and Melinda Gates Foundation and the Walton Family Foundation.¹⁵ These private foundations were no longer listed as donors to OAPCS in late 2016, and at least one organization indicated that Ohio would no longer be targeted for receipt of funding.¹⁶ Much of the dismay surrounding these schools can be traced to flexible laws that govern these schools' sponsors.

¹⁰ See Doug Livingston, *Four Ohio Charter Schools To Close for Poor Academic Performance; One in Canton*, AKRON BEACON J. (June 3, 2015), <http://www.ohio.com/news/break-news/four-ohio-charter-schools-to-close-for-poor-academic-performance-one-in-canton-1.597172> [https://perma.cc/57NQ-LH4G]. "The Ohio Department of Education has taken control of eight charter schools and has initiated the process of closing four for poor academic performance . . . [A]bout 700 children were in the failed charters." *Id.*

¹¹ Kimberly Hefling, *Charter School Scandal Haunts John Kasich*, POLITICO (Mar. 14, 2016), <http://www.politico.com/story/2016/03/charter-school-scandal-haunts-john-kasich-220700> [https://perma.cc/5KZB-Z35S]. David Hansen, former Ohio charter school chief and husband to John Kasich's former presidential campaign manager Beth Hansen, "acknowledg[es] that he didn't include the grades of online charter schools in ratings of their oversight agencies." *Id.*

The online schools are generally low-performing and have ties to GOP donors

. . . [T]he state took the embarrassing step in January [2016] of updating its application figures [for a \$71 million federal Education Department grant] to say that instead of having nine charter schools that are poor performing, [fifty-seven] are in that condition.

Id.

¹² Doug Livingston, *Charter Schools Misspend Millions of Ohio Tax Dollars as Efforts To Police Them Are Privatized*, AKRON BEACON J. (May 30, 2015), <http://www.ohio.com/news/local/charter-schools-misspend-millions-of-ohio-tax-dollars-as-efforts-to-police-them-are-privatized-1.596318> [https://perma.cc/4QKX-TBTX].

[C]harter schools misspend public money nearly four times more often than any other type of taxpayer-funded agency.

Since 2001, state auditors have uncovered \$27.3 million improperly spent by charter schools, many run by for-profit companies, enrolling thousands of children and producing academic results that rival the worst in the nation.

Id.

¹³ *Charter Schools: Last Week Tonight with John Oliver* (HBO television broadcast Aug. 21, 2016).

¹⁴ Bill Bush, *Ohio Charter-School Advocacy Group Disbanding*, COLUMBUS DISPATCH (Dec. 14, 2016), <http://www.dispatch.com/content/stories/local/2016/12/14/ohio-charter-school-advocacy-group-disbanding.html#> [https://perma.cc/8YX2-TXUA].

¹⁵ *Id.*

¹⁶ *Id.*

Though certainly not all Ohio charter schools are failing,¹⁷ Ohio's laws have reduced the state's charter schools to a national laughingstock.¹⁸ This delegitimizes those schools that are doing good work, harms children who need great schools, and harms those families who have placed their trust in these private entities. Attempts at reform have come about in the state. Ohio's House Bill 2 was passed into law on October 7, 2015, and was enacted February 1, 2016.¹⁹ Ohio's Senate Bill 148 remains (likely lifeless)²⁰ in the Education Subcommittee of the greater Finance Committee.²¹

Various nonprofit organizations seek to "rank" the states based on the strengths of their charter school laws.²² Different nonprofit organizations have different aims that they seek to further; this Note's proposals seek to further high-quality education. This Note is not unabashedly pro-charter schools. Though charters offer innovation and options in communities that traditionally lack school choice, failing charter schools are failing schools—failing schools fail children and communities. Given the discord and division that charter schools can create in communities, charter institutions must be held to at least the same high standard as their traditional public peers.

This Note seeks to understand how Ohio's charter school laws currently function compared to the laws of other states, and proposes how Ohio's laws can be improved. Part II first explains the structure by which Ohio's charter schools are run; where the state grants authority to an authorizer, who grants authority to a charter school to operate. Part III will look at two reform attempts

¹⁷ For a list of ratings of community schools, see OHIO DEP'T OF EDUC., 2015–2016 COMMUNITY SCHOOL GRADES, <http://education.ohio.gov/getattachment/Topics/Data/Report-Card-Resources/Community-Schools-GRADES.xlsx.aspx> [https://perma.cc/5D8F-9JNQ].

¹⁸ See Patrick O'Donnell, *Ohio's Charter Schools Ridiculed at National Conference, Even by National Charter Supporters*, CLEVELAND.COM (Mar. 4, 2015), http://www.cleveland.com/metro/index.ssf/2015/03/ohios_charter_schools_ridicule.html [https://perma.cc/5FMK-LLJJ] ("Ohio's \$1 Billion charter school system was the butt of jokes at a conference for reporters on school choice in Denver late last week The shots came from expected critics like teachers unions, but also from pro-charter voices"); see also Doug Livingston, *Ohio Charter Schools Identified as Among Worst in Nation*, AKRON BEACON J. (Mar. 1, 2015), <http://www.ohio.com/news/break-news/ohio-charter-schools-identified-as-among-worst-in-nation-1.570727> [https://perma.cc/8F9A-NQCQ] ("While panelists disagreed on how much regulation should be applied to charter schools, . . . there was little debate about where some of the lowest performing charter school companies operate."). One panelist said that Mike Petrilli, President of the Ohio authorizer Fordham Institute, "could probably go down a list of Ohio operators that fall into this category." *Id.*

¹⁹ H.R. 2, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).

²⁰ See *infra* notes 78–80 and accompanying text.

²¹ See S. 148, 131st Gen. Assemb., Reg. Sess. (Ohio 2015).

²² See, e.g., NAT'L ALL. FOR PUB. CHARTER SCH., MEASURING UP TO THE MODEL 74–75 (7th ed. 2016), http://www.publiccharters.org/wp-content/uploads/2016/01/Model-Law-Final_2016.pdf [https://perma.cc/UG35-86W4] (ranking Ohio twenty-third in the country for its charter school laws); *Ohio #11*, CTR. FOR EDUC. REFORM, <http://educationopportunityindex.edreform.com/parent-power-index/OH/> [https://perma.cc/E36G-8A9E] (ranking Ohio eleventh in the country for its charter school laws).

that have been debated in the Ohio legislature—a looser, but enacted piece of legislation, and a stricter, but unenacted piece. Finally, Part IV will give recommendations to the states for better oversight of charter school authorizers based upon the legislation that is working in some states and Ohio’s own attempts to restructure governance. Some of these recommendations include better state control of charter school authorizers, defined separation of church and state, defined separation of control between an authorizer and a school, and reforming the school reporting system to both better identify failing schools and to better promote report card information to families.

II. OHIO LAW—HOW ARE CHARTERS IN THE STATE OF OHIO ORGANIZED?

The Community Schools Act, enacted in Ohio in 1997, added Ohio to the mix of states that permitted charter schools.²³ Community schools, also known as charter schools, are publicly funded, privately run, free, and openly attended institutions.²⁴ When charter schools were proposed by then-President of the American Federation of Teachers Albert Shanker in front of the National Press Club in 1988, they were visualized as a type of laboratory, in which teachers could experiment with new and innovative ways of teaching.²⁵ These schools were thought to exist as a potential model, from which traditional public schools could draw best practices.²⁶ With less rigid governance than traditional public schools, theorists also proposed that teachers could give input on the way in which the school was run; this was thought to improve teacher morale and retention.²⁷ Shanker proposed that traditional public schools served only some 20% of students adequately, and that different types of schools could better address the needs of the other 80% of students.²⁸ Shanker’s proposal initially incorporated the influence of unions and union policy, and also included the bending of some rules in order to allow for innovation.²⁹ Contrast this with today, where teachers unions are typically pitted against charter schools;³⁰ a

²³ H.R. 215, 122d Gen. Assemb., Reg. Sess. (Ohio 1997).

²⁴ Anya Kamenetz, *Bernie Sanders Says He Opposes Private Charter Schools. What Does That Mean?*, NPR (Mar. 15, 2016), <https://www.npr.org/sections/ed/2016/03/15/470376273/bernie-sanders-says-he-opposes-private-charter-schools-what-does-that-mean> [<https://perma.cc/8M9W-5K56>].

²⁵ KAHLBERG & POTTER, *supra* note 2, at 6–7.

²⁶ *Id.* at 7.

²⁷ *See id.* at 6–8.

²⁸ *Id.* at 7.

²⁹ *Id.* at 8.

³⁰ *See* Elias Isquith, *Charter Schools’ Worst Nightmare: A Pro-Union Movement May Change Charters Forever*, SALON (July 18, 2015), https://www.salon.com/2015/07/18/charter_schools_worst_nightmare_a_pro_union_movement_may_change_charters_forever/ [<https://perma.cc/B54H-YAVE>] (“And if you happen to think of teachers unions at some point . . . you’ll probably have them in the role they’re traditionally assigned by the media—as anti-charter and anti-reform.”); Randi Weingarten, *A Coordinated National Effort To*

Center for Education Reform study found that “[o]nly about 7[%] of charter schools were unionized in 2012.”³¹

Ohio structures the governance hierarchy of traditional public schools with the Ohio Department of Education at the top, a publicly elected district school board below the Ohio Department of Education, a superintendent, chosen by the district school board, sitting below, and the schools at the bottom, under the governance of the superintendent.³² Community schools also have the Ohio Department of Education at the top, but place a sponsor immediately beneath the department.³³ Beneath the sponsor, the school has a board that is privately appointed.³⁴ Community schools can be run either directly by these boards, without the use of a superintendent, or by an external operator.³⁵ Operators can provide any level of service that the school agrees to; some sample services include professional development, recruitment, and fundraising.³⁶ Nonprofit operations are called community management organizations, or CMOs.³⁷ For-profit organizations are called education management organizations, or EMOs.³⁸ Often, charter schools that are part of a network will allow an operator to take charge of day-to-day governance.³⁹

A. What Is a Sponsor?

A sponsor is a middleman between the state and a charter school; sponsors grant charter schools in the state of Ohio the authority to operate.⁴⁰ Sponsors are

Decimate Public Schools, HUFFPOST (Apr. 13, 2014), https://www.huffingtonpost.com/randi-weingarten/a-coordinated-national-ef_b_9683210.html [<https://perma.cc/RQ6M-ZLVK>] (explaining the opinion of Weingarten, President of the American Federation of Teachers, who is largely critical of charter schools); Hella Winston, *How Charter Schools Bust Unions*, SLATE (Sept. 29, 2016), http://www.slate.com/articles/business/the_grind/2016/09/the_lengths_that_charter_schools_go_to_when_their_teachers_try_to_form_unions.html [<https://perma.cc/BX9J-VHSL>] (expressing the stories of various charter schoolteachers treated with hostility by their employers after attempts to unionize).

³¹ Arianna Prothero, *Why More Charter Schools Aren't Unionized*, EDUC. WK.: CHARTERS & CHOICE (Sept. 18, 2014), http://blogs.edweek.org/edweek/charterschoice/2014/09/why_more_charter_schools_arent_unionized.html [<https://perma.cc/4NE9-GRJ8>].

³² JESSICA POINER, THOMAS B. FORDHAM INST., OHIO COMMUNITY SCHOOL GOVERNANCE: AN OVERVIEW 2–3 (Sept. 2015), <http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Charter%20School%20Governance%20final%20for%20publication%20as%20of%209-15-15.pdf> [<https://perma.cc/HB3P-2PR3>].

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.* at 3, 5.

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ POINER, *supra* note 32, at 5. Operators often operate networks of charter schools; these schools are sometimes across multiple states. *Id.*

³⁹ *Id.*

⁴⁰ OHIO REV. CODE ANN. § 3314.02(A)(1) (West Supp. 2017); *see also Ohio School Sponsorship Program*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Quality-School->

also responsible for some level of operational and financial oversight.⁴¹ Sponsors can receive a portion of the money given to a charter in order to recover costs of oversight.⁴² Sponsors are often known as “authorizers” outside the state of Ohio.⁴³

In the state of Ohio, groups who can sponsor charter schools include: the Ohio Department of Education Office of School Sponsorship, the local school district’s board of education, a school district’s board of education in the same county, the board of education of a joint vocational school district, an educational service center’s governing board, a state university’s board of trustees, or a qualified tax-exempt 501(c)(3) entity.⁴⁴ To be a qualifying 501(c)(3) entity, the group must have been in operation for at least five years prior to becoming a school sponsor, must have “assets of at least five hundred thousand dollars and a demonstrated record of financial responsibility,” the entity may not itself be a community school, and the entity must be deemed by the Ohio Department of Education to be an “education-oriented entity . . . [with a] demonstrated record of successful implementation of educational programs.”⁴⁵ In practice, a “qualifying 501(c)(3) entity” is loosely defined.⁴⁶

Qualifying groups range widely.⁴⁷ The Thomas B. Fordham Institute, for example, is an authorizer that also produces research and expert testimony for the education reform movement.⁴⁸ St. Aloysius Orphanage of Cincinnati sponsors around forty charter schools,⁴⁹ but has contracted “sponsorship

Choice/Ohio-School-Sponsorship-Program [https://perma.cc/27GD-4SZ4] (last modified Dec. 29, 2017).

⁴¹ POINER, *supra* note 32, at 4.

⁴² See Jim Siegel & Catherine Candisky, *Charter School Sponsors Say Ohio’s New Evaluations Go Overboard*, COLUMBUS DISPATCH (July 31, 2016), <http://www.dispatch.com/content/stories/local/2016/07/31/strict-evaluations-required-of-charter-school-sponsors.html> [https://perma.cc/VZ82-VWAT] (“The nonprofit sponsors allow schools to stay open and collect up to 3[%] of the school’s state revenue.”).

⁴³ Patrick O’Donnell, *Ohio’s New Charter School “Reform” Effort: What’s All This Talk About Sponsors?*, CLEVELAND.COM (Feb. 8, 2015), http://www.cleveland.com/metro/index.ssf/2015/02/ohios_new_charter_school_reform_effort_whats_all_this_roundabout_talk_about_sponsors.html [https://perma.cc/NZ92-7AA8].

⁴⁴ OHIO REV. CODE ANN. § 3314.02(C).

⁴⁵ *Id.* § 3314.02(C)(1)(f).

⁴⁶ See, e.g., *Full List of 501(c)3 Authorizers/Sponsors*, OHIO ALLIANCE FOR PUB. CHARTER SCHOOLS, <http://www.oapcs.org/resources/full-list-501c3-authorizers/sponsors> [https://perma.cc/7DSH-NKXA]. The Buckeye Community Hope Foundation, whose primary mission is to build affordable housing, is also a sponsor of some fifty-one community schools. *About Buckeye Community Hope Foundation*, BUCKEYE COMMUNITY HOPE FOUND., <http://buckeyehope.org/about/> [https://perma.cc/V86E-GTW4].

⁴⁷ See *Full List of 501(c)3 Authorizers/Sponsors*, *supra* note 46.

⁴⁸ *About Us*, THOMAS B. FORDHAM INST., <https://edexcellence.net/about-us> [https://perma.cc/L9Q6-7NBF].

⁴⁹ *Full List of 501(c)3 Authorizers/Sponsors*, *supra* note 46.

services” out to a limited liability company, Charter School Specialists.⁵⁰ St. Aloysius Orphanage, and thus also Charter School Specialists, were the responsible sponsors in the scandal-laden case of Olympus Charter Schools, a group of eight charter schools that were managed by a for-profit corporation and only operated for a month before they “collapsed.”⁵¹ At the time that the schools closed, the eight schools were serving a total of 128 students, even though the state had been paying for 700 students.⁵² Charter School Specialists was to serve as the treasurer for Olympus Charter Schools and as its sponsor’s “financial watchdog,” which a spokesperson from the company believed “was not a conflict of interest.”⁵³

A more egregious example of a corrupt authorizer is Kids Count of Dayton, Inc.⁵⁴ Kids Count lists on its website that its explicit mission is to “promote K–12 educational excellence through high quality charter school authorizing.”⁵⁵ Kids Count was the authorizer tasked with overseeing Richard Allen Schools.⁵⁶ The Institute of Charter School Management Resources (a for-profit company) provided consulting for and collected lease payments from Richard Allen Schools.⁵⁷ The Institute of Management Resources (a nonprofit group) managed the financial resources for Richard Allen Schools.⁵⁸ Jeanette Harris founded Kids Count; Jeanette Harris served as the CEO and President of Richard Allen Schools; Jeanette Harris ran the Institute of Charter School Management Resources; Jeanette Harris founded the Institute of Management Resources.⁵⁹ This web meant that the schools were essentially overseen by themselves, and that one group was able to cycle taxpayer dollars into personal income. Kids Count of Dayton still authorizes charter schools today.⁶⁰

⁵⁰ OHIO SEC’Y OF STATE, DOC. 200423803352, ARTICLES OF ORGANIZATION/DOM. LLC (2004), <http://www2.sos.state.oh.us/reports/rwervlet?imgc12g&Din=200423803352> [https://perma.cc/N8C2-GGZ2]; *Client Spotlight: St. Aloysius Orphanage*, CHARTER SCH. SPECIALISTS, http://www.charterschoolspec.com/pages/client_spotlight.asp [https://perma.cc/8B3F-RZAR].

⁵¹ Bill Bush, *Taxpayers’ \$1.2 Million Propped Up Owner’s 2nd Charter-School Bust*, COLUMBUS DISPATCH (Nov. 19, 2013), <http://www.dispatch.com/content/stories/local/2013/11/19/ohios-1-2m-propped-up-owners-2nd-charter-bust.html> [https://perma.cc/ZBU4-6CKS].

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Christopher Magan & Margo Rutledge Kissell, *Lack of Oversight an Issue for Model Charter School System*, DAYTON DAILY NEWS (June 12, 2011), <http://www.daytondailynews.com/news/local/lack-oversight-issue-for-model-charter-school-system/c97phzmbZ86WHQpVpZjPKI/> [https://perma.cc/DLV8-TBDE].

⁵⁵ KIDS COUNT OF DAYTON, INC., <http://www.kidscountdayton.com/> [https://perma.cc/TCT6-KHRZ].

⁵⁶ Magan & Kissell, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Kids Count of Dayton, Inc.*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Community-Schools/Sponsor-Documents/Sponsors/Kids-Count-of-Dayton-Inc> [https://perma.cc/7RJ3-JPYM] (last modified Oct. 13, 2016).

The legislation, as it is currently written, allows for groups that have no business in the education industry to sponsor charter schools. It also allows for corruption scandals to prosper. The Ohio Department of Education's failure to keep a careful reign on its charter industry has brought embarrassment to the state.⁶¹

B. *The Law, Pre-House Bill 2*

When charter school laws were first enacted, the State Board of Education, which oversees the Ohio Department of Education, was one of only three entities that was able to authorize charter schools.⁶² In 2003, after the Ohio Department of Education rejected several applicants due to problems with their applications, lawmakers temporarily reduced the department's authority, forcing the department to turn over authorization of schools to other sponsors.⁶³ Now, the Office of School Sponsorship, within the Ohio Department of Education, is again permitted to authorize schools, and it also has the authority to reject schools that it does not wish to sponsor.⁶⁴

C. *Critiques of Ohio's System*

The state of Ohio has one of the most lax systems in the country in terms of whom it permits to authorize charter schools.⁶⁵ Allowing nonprofit organizations to sponsor charter schools is rare;⁶⁶ though this does not necessarily create the issue of inconsistent quality in schools, it does add variety to the types of authorizers.⁶⁷

⁶¹ See *Charter Schools: Last Week Tonight with John Oliver*, *supra* note 13.

⁶² Doug Livingston, *Ohio Charter-School Sponsors Are Responsible for Schools that Lost Taxpayer Money*, AKRON BEACON J. (May 31, 2015), <http://www.ohio.com/news/local/ohio-charter-school-sponsors-are-responsible-for-schools-that-lost-taxpayer-money-1.596446> [<https://perma.cc/Z4X4-QR8G>]; *About the State Board of Education*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/State-Board/State-Board-of-Education-Home> [<https://perma.cc/E3CK-YC33>] (last modified Nov. 21, 2017).

⁶³ Livingston, *supra* note 62.

⁶⁴ *Ohio School Sponsorship Program*, *supra* note 40 (click on "Approval Criteria" hyperlink).

⁶⁵ *Types of Authorizers*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS, <http://www.qualitycharters.org/authorizer-types/> [<https://perma.cc/DUJ3-YGTB>]. Ohio is one of only two states that permit nonprofit organizations to serve as charter school authorizers. *Id.* The only type of NACSA-recognized authorizer that Ohio does not allow is an Independent Chartering Board (an independent group commissioned by the state that has a sole mission of authorizing and overseeing charter schools) and Non-Educational Government Entities (mayors or municipalities that serve as authorizers). *Id.*

⁶⁶ *Id.* (noting that Ohio and Minnesota are the only two states in the country that allow nonprofit organizations to serve as charter school authorizers).

⁶⁷ See *Map: Who Oversees Charters in Your State?*, EDUC. WK. (Aug. 27, 2014), <http://www.edweek.org/ew/section/multimedia/charter-authorizers-by-state.html> [<https://perma.cc/NLL3-LYU2>].

Ohio charter schools having too many authorizers is an issue because many authorizer groups are unable to dedicate the appropriate time, money, effort, and resources into appropriate oversight of their school.⁶⁸ The trouble arises when groups that have little experience with charter school authorization are charged with oversight of such a school.⁶⁹ In the 2015–2016 school year, some of the worst rated charter school authorizers (rated “poor” with academic performance of an “F”) included Cincinnati City (sponsored two schools), Jackson City (sponsored one school), Lakewood Local (sponsored one school), Lawrence County ESC (sponsored one school), Lima City (sponsored one school), Lorain City (sponsored one school), Oregon City (sponsored one school), Reynoldsburg City (sponsored five schools), Rittman Exempted Village (sponsored one school), Southwest Licking Local (sponsored one school), and Youngstown City (sponsored one school).⁷⁰

Another critique lies in the indirect manner by which the state controls its charter schools.⁷¹ When the Ohio Department of Education sought to close VLT Academy in Cincinnati, Ohio, for poor performance (the school “failed to meet 97% of the state standards applicable to it, received an ‘F’ on its latest report card,” and had a history of hiring family members in its public contracts),⁷² the Hamilton County Court of Common Pleas held that the Ohio Department of Education was required to serve as the sponsor for VLT Academy, and was also required to give the school enough money to pay its debts.⁷³ This was reversed at the appellate level, but the fact remains that the Ohio Department of Education was required to appeal a ruling in order to close a poorly performing school that

⁶⁸ Joey Gustafson, *Charter Authorizers Face Challenges*, EDUC. NEXT, Summer 2013, at 32, 33–35; Patrick O’Donnell, *Ohio Is the “Wild, Wild West” of Charter Schools, Says National Group Promoting Charter Standards*, CLEVELAND.COM (Dec. 18, 2014), http://www.cleveland.com/metro/index.ssf/2014/07/ohio_is_the_wild_wild_west_of.html [https://perma.cc/L6FF-CP8S].

⁶⁹ See Patrick O’Donnell, *State Will Take Charter Schools Away from 21 Sponsors Slapped with “Poor” Ratings*, CLEVELAND.COM (Oct. 13, 2016), http://www.cleveland.com/metro/index.ssf/2016/10/state_will_take_charter_schools_away_from_21_sponsors_slapped_with_poor_ratings.html [https://perma.cc/4HFV-BAVT] (“[M]ost of the ‘poor’ sponsors oversee just one or two schools, not dozens like some of the non-profits do. ‘It’s the folks that dabble in this with one or two schools, more than those that do a lot,’ said State Sen. Peggy Lehner, chair of the Senate Education Committee.”).

⁷⁰ *Id.*; *Overall Sponsor Ratings*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Community-Schools/Sponsor-Ratings-and-Tools/Overall-Sponsor-Ratings> [https://perma.cc/HP3F-NH2L] (last modified Aug. 23, 2017) (scroll to “Who sponsored my school in” and click “2015–2016”).

⁷¹ O’Donnell, *supra* note 43 (“Ohio doesn’t have a simple plan to weed out its bad charter schools. The state instead has an indirect strategy.”).

⁷² Ohio Department of Education’s Brief in Opposition to a Stay at 3, 7, VLT Acad. v. Ohio Dep’t of Educ., No. A-1402393 (Ohio Ct. Com. Pl. Hamilton Cty. May 9, 2014).

⁷³ Order Granting Appellant’s Motion, VLT Acad. v. Ohio Dep’t of Educ., No. A-1402393 (Ohio Ct. Com. Pl. Hamilton Cty. July 15, 2014).

engaged in self-dealing.⁷⁴ This decentralization of control leads to the Ohio Department of Education having no direct way to close a corrupt or underperforming school.

III. ATTEMPTS AT REFORM IN THE STATE OF OHIO

In the Ohio charter school industry, 2014 was laden with scandal. Criticism by a representative from the National Association of Charter School Authorizers at an early 2014 conference in Nashville, Tennessee brought embarrassment and national attention to the state's authorizing system.⁷⁵ As a part of the panel presentation, the representative stated, "Ohio has a real quality control problem Ohio's more broken than the Wild West."⁷⁶ A 2015 Denver conference for reporters on school choice singled out Ohio's laws as well.⁷⁷ The Ohio 131st General Assembly introduced two pieces of legislation in early 2015, House Bill 2 and Senate Bill 148, designed to rein in authorization laws.⁷⁸ Senate Bill 148, when it was introduced, was considered the stronger of the two charter school reform bills.⁷⁹ Senate Bill 148 was largely forgotten when parts of its content were merged into House Bill 2.⁸⁰

House Bill 2 is an enacted piece of legislation that came about in the wake of public outrage regarding sponsor-hopping.⁸¹ It was introduced by Republican

⁷⁴ J.L. Brown, *Embattled Charter VLT Academy Closes for Good*, CINCINNATI ENQUIRER (Aug. 12, 2014), <http://www.cincinnati.com/story/news/education/2014/08/11/embattled-charter-school-vlt-shuts-doors-for-good/13916819/> [<https://perma.cc/WP3A-DH86>].

⁷⁵ O'Donnell, *supra* note 68.

⁷⁶ *Id.*

⁷⁷ O'Donnell, *supra* note 18.

⁷⁸ *House Bill 2: Status*, OHIO LEGISLATURE: 131ST GEN. ASSEMBLY, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-HB-2> [<https://perma.cc/G9JY-G8QM>]; *Senate Bill 148: Status*, OHIO LEGISLATURE: 131ST GEN. ASSEMBLY, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA131-SB-148> [<https://perma.cc/DY7B-9C6W>].

⁷⁹ See Editorial Board, Editorial, *Charter-School Reforms Unveiled in Ohio Senate Need Tweaks but Are a Significant Step Forward*, CLEVELAND.COM (Apr. 22, 2015), http://www.cleveland.com/opinion/index.ssf/2015/04/charter-school_reforms_unveile.html [<https://perma.cc/XA3C-KD7C>].

⁸⁰ See *Legislative Update*, OHIO LATINO AFF. COMMISSION, <http://ochla.ohio.gov/Portals/0/Public%20Policy/Legislative%20Update%20June%202011,%202015.pdf> [<https://perma.cc/2D65-K8VK>]. Compare OHIO REV. CODE ANN. § 3302.03 (West Supp. 2017) (offering no exemption for academic data in sponsor evaluation for dropout recovery schools), with H.R. 2, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (as introduced) (exempting academic data in sponsor evaluations for dropout recovery schools until July 1, 2016), and S. 148, 131st Gen. Assemb., Reg. Sess. (Ohio 2015–2016) (as introduced) (offering no exemption for academic data in sponsor evaluation for dropout recovery schools).

⁸¹ See Patrick O'Donnell, *Poor-Performing Charter Schools Aren't Finding Second Chances After Ohio's Charter Reform*, CLEVELAND.COM (June 19, 2016), http://www.cleveland.com/metro/index.ssf/2016/06/poor_performing_charter_school.html#incart_m-rpt-1 [<https://perma.cc/23MT-C5RQ>].

Representatives Kristina Roegner and Mike Dovilla,⁸² and it passed with support from a small amount of bipartisanship.⁸³

A. Content of House Bill 2

House Bill 2 was introduced in the Ohio Legislature on January 28, 2015, and passed votes in both the Ohio House of Representatives and Senate on October 7, 2015.⁸⁴ It was introduced specifically in order to end the practice of “sponsor-hopping,” where a charter school whose authorizer refused to continue to support them would simply shop to find a new authorizer.⁸⁵ It tightens restrictions on charter school sponsors, advancing sponsorship practices to bolster state oversight of sponsors.⁸⁶

House Bill 2 clarifies the duty of a community school sponsor, requiring that a sponsor provide “monitoring and technical assistance” to each school that it sponsors.⁸⁷ It changes the system by which authorizers are rated, creating four ratings of “exemplary,” “effective,” “ineffective,” or “poor,” based on the academic performance of students enrolled in an authorizer’s community schools, adherence to quality practices, and compliance with applicable laws and administrative rules.⁸⁸ Authorizers that are rated ineffective are prohibited from sponsoring any additional charter schools, and those who receive such a rating for three consecutive years have their sponsorship authority revoked.⁸⁹ An authorizer who is rated poor has its sponsorship authority revoked.⁹⁰

An appeals process exists for sponsors receiving ratings of ineffective and poor.⁹¹ Those sponsors receiving ineffective and poor ratings have thirty days to appeal to the superintendent of public instruction.⁹² Within thirty days of receipt of notice of appeal, the superintendent must appoint an independent

⁸² *House Bill 2: Summary*, OHIO LEGISLATURE: 131ST GEN. ASSEMBLY, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-HB-2> [<https://perma.cc/6F5H-EC67>].

⁸³ *House Bill 2: Votes*, OHIO LEGISLATURE: 131ST GEN. ASSEMBLY, <https://www.legislature.ohio.gov/legislation/legislation-votes?id=GA131-HB-2> [<https://perma.cc/2SCF-M5FF>] (indicating under “Votes” that twenty-nine Democrats in the House voted for the bill alongside sixty-three Republicans, and that nine Democrats in the Senate voted for the bill alongside twenty-two Republicans and one Independent).

⁸⁴ *House Bill 2: Status*, *supra* note 78.

⁸⁵ O’Donnell, *supra* note 81.

⁸⁶ Jim Siegel, *House Passes Bill To Reform Ohio Charter Schools*, COLUMBUS DISPATCH (Mar. 26, 2015), <http://www.dispatch.com/content/stories/local/2015/03/26/charter-bill-pass.html> [<https://perma.cc/U7RR-XVEG>].

⁸⁷ OHIO REV. CODE ANN. § 3314.023 (West Supp. 2017).

⁸⁸ *Id.* § 3314.016(B)(1)(a)–(c), (B)(7)(b)–(c).

⁸⁹ *Id.* § 3314.016(B)(7)(b)(i)–(ii).

⁹⁰ *Id.* § 3314.016(B)(7)(c).

⁹¹ *Id.* § 3314.016(B)(7)(b)–(c).

⁹² *Id.*

hearing officer, who must conduct a hearing.⁹³ Within forty-five days of the hearing's completion, the state Board of Education must decide whether or not the revocation of authorizing authority is appropriate.⁹⁴ House Bill 2 further disallows compensation of more than \$125 per meeting for someone serving on the governing board of a community school.⁹⁵

B. Analysis of House Bill 2

Chad Aldis of the Fordham Institute, an educational nonprofit think tank in Dayton and charter school sponsor, testified in favor of both House Bill 2 and Senate Bill 148 before the education subcommittee.⁹⁶ In the portion of his testimony directed at House Bill 2, he spoke favorably about how sponsors are disallowed “from selling services to the schools that they sponsor,”⁹⁷ a vital rule after the Olympus Schools scandal.⁹⁸ He also mentioned approval of the requirement of conflict-of-interest statements, and independent fiscal officers and attorneys to ensure that boards are more independent.⁹⁹

The bill's provisions requiring sponsor disclosure of how their 3% of funds are spent is a step in the right direction, but Aldis mentions that the bill does not go far enough as to actually prohibit spending the money on non-oversight expenditures.¹⁰⁰ Though public disclosure certainly promotes transparency, this relies on public outcry in order to make change. Public outcry can create change, but it does not remediate a situation where a failing school, or failing sponsor, continues to fail to educate children.

IV. TIGHTENING CONTROL ON AUTHORIZERS, AND INCREASING BOARD OF EDUCATION POWER

The National Association of Charter School Authorizers proposes three governing principles that states should consider in their charter laws: (1) student access to good schools, (2) school autonomy, and (3) school and standard

⁹³ OHIO REV. CODE ANN. § 3314.016(B)(7)(b)–(c).

⁹⁴ *Id.*

⁹⁵ *Id.* § 3314.02(E)(5).

⁹⁶ *Thomas B. Fordham Institute Proponent Testimony on Ohio House Bill 2 and Senate Bill 148 Before the S. Subcomm. on Educ.*, 131st Gen. Assemb., Reg. Sess. (Ohio 2015) [hereinafter *Aldis Testimony*], <https://edexcellence.net/articles/thomas-b-fordham-institute-proponent-testimony-on-ohio-house-bill-2-and-senate-bill-148> [https://perma.cc/PG2G-BPXE] (statement of Chad Aldis, Vice President, Thomas B. Fordham Institute).

⁹⁷ *Id.*

⁹⁸ See *supra* notes 51–53 and accompanying text.

⁹⁹ *Aldis Testimony*, *supra* note 96. This too was a problem faced in the Olympus Schools scandal. See *supra* notes 50–53 and accompanying text. The provision requiring that contracts with attorneys and accountants be independent from school operators can be found in OHIO REV. CODE ANN. § 3314.03(A)(31).

¹⁰⁰ *Aldis Testimony*, *supra* note 96.

accountability.¹⁰¹ Eight policies designed to further this goal include: allowing “at least one body other than the local school district” to authorize charter schools; state standards for authorizer quality; evaluations for authorizers; sanctions for authorizers; that each authorizer annually publish a report about the academic performance of each of its schools; that high-performing schools are encouraged to replicate; that authorizers are able to close schools that do not meet their academic expectations; and that schools performing below a certain minimum threshold are closed by default.¹⁰²

In order to prevent states from becoming the “Wild West” of charter school laws, the state should establish greater independence between those who authorize and monitor charter schools, and those who have a vested interest in their success. First, states should enact strict authorization laws, if the states are not serving as the authorizers of charter schools themselves. Second, charter schools should borrow separation of control principles from corporate law to prevent self-dealing and corruption.

A. Toward a Stricter Authorization System

In order for charter schools to serve students and communities effectively, they must be strictly governed and closely regulated.¹⁰³ This requires cutting a large number of the exceptions and concessions that are given to charter schools that are not meeting the state’s requirements, or that are continuing to permit ineffective charter schools to operate. States should tightly control which entities get to be authorizers, with a focus on decreasing the number of charter school operators that authorize fewer than five schools.

¹⁰¹ NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS, ON THE ROAD TO GREAT CHARTER SCHOOLS: STATE POLICY ANALYSIS 4 (2016), <http://www.qualitycharters.org/wp-content/uploads/2016/12/On-The-Road-to-Great-Charter-Schools-State-Policy-Analysis-2016.pdf> [https://perma.cc/UML5-62KB].

¹⁰² *Id.*

¹⁰³ See Marci Cornell-Feist, *Steering the Course for Success: Authorizers and Effective Charter School Governance*, AUTHORIZER ISSUE BRIEF (Nat’l Ass’n Charter Sch. Authorizers), Jan. 2005, at 1, 1, http://www.qualitycharters.org/wp-content/uploads/2015/11/IssueBrief_SteeringTheCourseForSuccess_2005.09.pdf [https://perma.cc/79TP-NGFM] (“Teacher competencies, student achievement, parental and community support, adequate facilities and resources are all critical and essential for success. Governance will determine how those characteristics are initiated, managed, supported and promoted.”); Doug Gavel, *Weighing In on the Charter School Debate*, HARV. KENNEDY SCH. (Jan. 24, 2017), <https://www.hks.harvard.edu/research-insights/policy-topics/education-training-and-labor/weighing-charter-school-debate> [https://perma.cc/B8RH-7QRM] (“Designing an effective charter school policy therefore requires attention to details about accountability and other features Choices along all these dimensions affect the extent to which charters can be a positive choice for students whose options are otherwise limited.”).

1. Increasing State Control of Authorizers

New York's charter school authorization system utilizes only a few bodies that are closely tied to the government.¹⁰⁴ This allows for strict monitoring and watch. New York's Board of Regents itself oversees schools that are approved, and holds itself partly responsible for the monitoring and inspection of operating schools.¹⁰⁵ Compare this to Ohio's process of evaluating a middleman sponsor, then relying on that middleman sponsor, followed by the state beginning the slow process of revoking the authorizing power of the sponsor in case the authorizer fails to respond appropriately.¹⁰⁶

A second option for states is the creation of an independent, statewide board that approves charter schools, as is used in Washington state and is recommended by the National Association of Charter School Authorizers.¹⁰⁷ This model stays true to the heart of charter schools, in that it offers independence from the state department of education.¹⁰⁸ At the same time, it eliminates the chances for authorizer shopping, where a school "shops" for an authorizer with weak standards for approval.¹⁰⁹ It also allows authorizers to focus singly on charter school quality while maintaining "statewide scope."¹¹⁰

Ohio's system, as opposed to both New York's system and the system of an independent statewide board, was created in a way that removed power directly from the government.¹¹¹ The authority to authorize charter schools was filtered down to a group of educational and nonprofit institutions, and an abandonment of this system would require complete restructuring of the law. The extensive changes necessary render this an unlikely possibility.

Minnesota's law offers a closer model for Ohio to mimic. Minnesota, like Ohio, grants authorization power to educational institutions and nonprofit organizations within the state, and is the only other state in the country that permits nonprofit organizations to authorize charter schools.¹¹² Minnesota tightly regulates who the nonprofit organization can be; the nonprofit must have

¹⁰⁴ See N.Y. EDUC. LAW § 2852(9-a)(a) (McKinney 2015).

¹⁰⁵ *Id.* § 2853(2).

¹⁰⁶ OHIO REV. CODE ANN. § 3314.016(B) (West Supp. 2017).

¹⁰⁷ Arianna Prothero, *States Create Independent Boards To Approve Charters*, EDUC. WK., Aug. 20, 2014, at 1, 17. The State Board of Education in Washington is responsible for approving school districts that wish to be authorizers of charter schools, and also authorizes charter schools through the Washington State Charter School Commission. *Public Charters*, WASH. STATE BD. OF EDUC., <http://www.sbe.wa.gov/charters.php#.WM9KjRLytsM> [<https://perma.cc/54A9-ZGVD>].

¹⁰⁸ See *supra* notes 24–27 and accompanying text.

¹⁰⁹ Prothero, *supra* note 107, at 17.

¹¹⁰ *Id.*

¹¹¹ See *supra* notes 104–06 and accompanying text.

¹¹² *Types of Authorizers*, *supra* note 65.

existed for at least twenty-five years and the school must have existed “for at least three years under a different authorizer.”¹¹³

Minnesota’s law also gives the ability to rescind a charter directly to the state, where the state of Ohio has created quite a bit of distance between itself and the charter school. For example, Minnesota’s commissioner may terminate the contract between a charter school authorizer and the school if the authorizer performs unsatisfactorily.¹¹⁴ In Ohio’s system, three years of a sponsor receiving ineffective ratings, or one year of a sponsor receiving a poor rating, from the department of education leads to its sponsorship authority being revoked.¹¹⁵ Revocation of sponsorship authority is thought to disincentivize sponsors from continuing to allow poor-performing charter schools to exist.¹¹⁶

B. Defined Separation of Control Between Authorizer and School

A problem that has haunted Ohio’s charter schools is a lack of separation of control between a charter school authorizer and those who operate the charter

¹¹³ MINN. STAT. ANN. § 124E.05, subd. 1(4) (West Supp. 2016). Ohio, on the other hand, permits any 501(c)(3) to sponsor a charter school as long as they have been in operation for at least five years (compared to Minnesota’s twenty-five), the entity has at least \$500,000 in assets and a record of financial responsibility, the entity is an education-oriented entity, and the entity is not itself a community school. OHIO REV. CODE ANN. § 3314.02(C)(1)(f) (West Supp. 2017). Minnesota’s law makes it much harder for a fledgling nonprofit organization to add authorization of charter schools to its mission, because of the wait period of three years for a school, or twenty-five years for an authorizer. Note that single-purpose authorizers are able to be formed, as long as they are charitable and nonsectarian and exist “for the sole purpose of [authorizing] charter[] schools.” MINN. STAT. ANN. § 124E.05, subd. 1(5) (West 2016).

¹¹⁴ MINN. STAT. ANN. § 124E.05, subd. 6. Some of the reasons provided for the commissioner terminating an authorizer’s ability to charter a school include the authorizer failing to demonstrate the criteria under which the school was approved, violating the chartering contract between itself and the school, or performing unsatisfactorily, or for “any good cause shown that provides the commissioner a legally sufficient reason to take corrective action against an authorizer.” *Id.* at subd. 6(b).

¹¹⁵ OHIO REV. CODE ANN. § 3314.016(B)(7)(b)(ii), (B)(7)(c). For an example of how the pressure on charter school sponsors is working (though less directly than the system in Minnesota), see Patrick O’Donnell, *Auction Ends Dreams for Closed Cleveland Charter School*, CLEVELAND.COM (Nov. 10, 2016), http://www.cleveland.com/metro/index.ssf/2016/11/auction_ends_dreams_for_closed.html [https://perma.cc/3WVH-R9PH].

¹¹⁶ O’Donnell, *supra* note 81. There exists a separate process by which the department of education can directly close down a school—by sending an “intent to close” letter. Doug Livingston, *Poorly Performing Charter Schools Sue Ohio for Trying To Shut Them Down*, AKRON BEACON J. (June 16, 2015), <http://www.ohio.com/news/break-news/poorly-performing-charter-schools-sue-ohio-for-trying-to-shut-them-down-1.600849> [https://perma.cc/L6LH-3QYF]. However, this process is difficult because it opens the department up to litigation after “singling out” certain schools for closure. See, e.g., Patrick O’Donnell, *State Succeeds in Closing Three Charter Schools—Imagine Cleveland, Villaview, and Cleveland Community School*, CLEVELAND.COM (Aug. 13, 2015), http://www.cleveland.com/metro/index.ssf/2015/08/state_succeeds_in_closing_thre.html [https://perma.cc/27SH-4HWR].

schools themselves.¹¹⁷ As overseers and accreditors, authorizers should be independent from school leadership. The principles of separation of control and independence exist in the corporate law context, and, thus, can be adapted for use in the education privatization context.¹¹⁸ House Bill 2 created a conflict-of-interest provision for charter school sponsors, but it does not go far enough in ensuring that true separation of control exists.¹¹⁹

The corporate law concept of establishing independence in a special litigation committee is exemplified in *Einhorn v. Culea*.¹²⁰ The test of independence asks,

Considering the totality of the circumstances . . . whether a reasonable person in the position of a member of a special litigation committee can base his or her decision on the merits of the issue rather than on extraneous considerations or influences . . . whether a member of a committee has a relationship with an individual defendant . . . that would reasonably be expected to affect the member's judgment with respect to the litigation in issue.¹²¹

Factors relevant to independence include "[a] committee member's participation in or approval of the alleged wrongdoing or financial benefits from the challenged transaction[,] . . . past or present business or economic dealings with an individual defendant[,] . . . [and] past or present personal, family, or social relations with individual defendants"¹²²

Establishing independence is a widely accepted practice in corporate law,¹²³ and the privatization of public education should be accompanied by the utilization of governance laws and standard practices of the private sector.¹²⁴ This principle should be implemented because corporate history has proven the

¹¹⁷ See *supra* notes 54–60 and accompanying text.

¹¹⁸ See *infra* notes 120–23 and accompanying text.

¹¹⁹ OHIO REV. CODE ANN. § 3314.02(E)(7). House Bill 2 requires that members of the charter school governing authority annually file statements with the names of immediate relatives or business associates who, within the previous three years, have been employed by the following: charter school sponsor, operator, school districts or educational service centers in contract with the school, or vendors for the school within the previous three years. *Id.*

¹²⁰ *Einhorn v. Culea*, 612 N.W.2d 78, 81 (Wis. 2000).

¹²¹ *Id.* at 89.

¹²² *Id.*

¹²³ See Jeremy J. Kobeski, In Re Oracle Corporation Derivative Litigation: *Has a New Species of Director Independence Been Uncovered?*, 29 DEL. J. CORP. L. 849, 850 (2004).

¹²⁴ See 303A.02 *Independence Tests*, N.Y.S.E. GUIDE (CCH), http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_4_3_3&manual=%2Fflcm%2Fsections%2Fflcm-sections%2F [https://perma.cc/5WUX-DSKL]; *Corporate Governance Requirements*, NASDAQ, http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_3&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F (on file with *Ohio State Law Journal*).

implementation to be a wise one.¹²⁵ If schools are to be privately run and privately governed, they should be held to the same standard of governance to which other private entities hold themselves.

V. CONCLUSION

Charter schools will only continue to be reviled until substantial reforms are made in the system that authorizes their operation. Departments of education must be given the authority that they need to close down ineffective charter schools, and to stop ineffective sponsors from continuing to sponsor charter schools. States looking to expand the reach of their charter schools should ensure that their system is either centralized by the state or tightly checked. Though it is unlikely that Ohio will be able to get to a system of more centralized control, like that of New York, there are certainly legislative checks that Ohio can put on groups that are authorizing charter schools.

Ohio, and other states looking to create or change their charter school laws, must find ways to ensure that the mistakes that have been made in the past are not made again. Authorization laws should be strict, and the state department of education should be empowered to directly close failing schools. Control between a charter school and its authorizer, who is supposed to provide oversight, must be separate.

Failing schools fail children; permitting failing schools to continue to operate disserves entire communities. Ohio, and all states with weak charter school laws, must make reforms in order to create a better future.

¹²⁵ See *The Lessons from Enron*, ECONOMIST (Feb. 7, 2002), <http://www.economist.com/node/976011> [<https://perma.cc/2E3S-RZTK>] (“At the heart of these audit failures lies a set of business relationships that are bedevilled by perverse incentives and conflicts of interest.”). Enron’s auditors theoretically should have been independently selected by shareholders, but were actually selected by company management, and were therefore under the influence of management. *Id.* “[I]t is far too easy to play on an individual audit partner’s fear of losing a lucrative audit assignment. Against such a background, it is little wonder that the quality of the audit often suffers.” *Id.*